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HAROLD B. WILLEY, Clerk

# Supreme Court of the United States

OCTOBER TERM, 1954.

**No. 408.**

RALPH LACHMAN *et al.*, IRVING KIPNIS *et al.*, TED-LAND REALTY CORP., HARRY KLUBECH *et al.*, RAL-JEAN, INC., MIRRIS FOX *et al.*, NAT TELLER *et al.*, ISADORE EVANS *et al.*, K. CHAACHOU, JESSIE S. REID, a Widow, *Appellants*,

vs.

THE CITY OF MIAMI BEACH, A MUNICIPALITY CREATED AND EXISTING UNDER THE LAWS OF THE STATE OF FLORIDA, *Appellee*.

APPEAL FROM THE SUPREME COURT OF FLORIDA.

**MOTION TO DISMISS, OR IN THE ALTERNATIVE, AFFIRM.**

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# Supreme Court of the United States

**No. 408.**

RALPH LACHMAN, IRVING KIPNIS, TEDLAND REALTY CORP., HARRY KLUBECH, RALJEAN, INC., MIRRIS FOX, NAT TELLER, ISADORE EVANS, K. CHAACHOU, and JESSIE S. REID, a Widow *et als., Appellants,*

vs.

THE CITY OF MIAMI BEACH, a Municipality Created and Existing under the Laws of the State of Florida, *Appellee.*

APPEAL FROM THE SUPREME COURT OF FLORIDA.

**MOTION TO DISMISS, OR IN THE ALTERNATIVE, AFFIRM.**

The City of Miami Beach respectfully moves the Court to dismiss the appeal or affirm the decrees appealed from because there is a clear lack of a Federal question presented.

In support of the motion, the appellee respectfully shows that:

1.

The appellants brought suits in the Circuit Court of Dade County, Florida, in which they sought to change the use classification imposed on their property by a zoning ordinance of the City of Miami Beach. The change sought to be effected was from single-family to multiple-family use. The classification was challenged, not on the ground that the ordinance was inherently unconstitutional, but because changes in the development of the Beach had made the classification presently unreasonable. A copy of the complaint in the Lachman* suit is appended hereto as Exhibit A. On final hearing, the Court held that the ordinance was arbitrary, unreasonable and invalid, "because said property is no longer adapted for the use for which it is zoned by reason of physical changes in the surrounding area and phenomenal growth of the City of Miami Beach" (52).**

2.

The Court held that the evidence which the appellants offered "fully and clearly established and maintained the allegations contained in the bill of complaint as amended * * *" (56).

3.

The lots in question lie interspersed throughout a long strip of ocean beach which extends for perhaps 1½ miles along the city's main arterial highway (Collins Avenue). Not being contiguous to each other, the rezon-

*All complaints were substantially the same.

**References are to appellants' Statement as to Jurisdiction.

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ing of one lot from a residential to a multiple-family use would have constituted what is generally known as spot zoning.

4.

The Circuit Court of Dade County found that the Collins Avenue roadway in front of the properties involved in the case would not be sufficient to take care of the increased traffic if hotels and apartment houses were built on all of the properties, and suggested that the plaintiffs should convey to the City without cost a portion of their land so as to provide for this width. Of course, this suggestion was wholly without any judicial effect. The basis, however, of the Court's holding and of the statement in the subsequent opinion of the Supreme Court of Florida that a change in the classification would necessarily affect the general zoning plan of the City, is reflected in the testimony of one of the witnesses for the City (Maurice Lipp, the Assistant City Manager and City Engineer.) Mr. Lipp testified that to provide for traffic in the event of a zoning change, Collins Avenue would have to be widened to 100 feet, the present roadway reconstructed entirely, street lights would have to be moved, and a new outlet for westbound traffic would have to be provided across Indian Creek. He said the estimated cost of the work was $1,950,000.00. He also said that in addition to the work above noted, the present sanitary sewer line would have to have larger mains, that a new pumping station and a force main would have to be built, and that 20-inch water mains would have to be installed, the cost of doing which (including sewer and pumping stations)

would be $300,000.00. The total of these estimates is $2,250,000.00. This would constitute a capital outlay of the City of Miami Beach, for which special assessments could not be levied and which would represent a direct contribution by the City at large to improvements in the affected area.

5.

One expert for the City testified that the *locus in quo* was one of the few tracts of land left in Dade County bordering the ocean which was not encroached upon by commercial or multi-family uses and which was in the vicinity of shopping centers. He said that as the Miami area grew and expanded, which it was doing at a rapid pace, one could expect that high-class residential areas would maintain usability for private residential purposes.

6.

Hugh Pomeroy, a nationally known planning and zoning expert*, testified that in his opinion the retention of the ocean front strip for the general purpose for which it was originally intended (single-family) was not only appropriate, but desirable, and, even more so, rather neces-

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*Director of Planning at Los Angeles County, 1923; organized California Planners Institute; directed revisionary study of Los Angeles County; Field Representative of American Society of Planning Officials; Director of Virginia State Planning Board; Executive Director of National Association of Housing Officials; Director of Westchester County, New York, Department of Planning; instructor in planning at Columbia University; past President of the American Institute of Plans and Technical Society, succeeding Edward M. Bassett, father of zoning law.

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sary to provide a satisfactory range of available living environments and a comprehensive land use for the City.

7.

The Supreme Court of Florida reversed the decision of the lower court, holding that it had usurped the legislative power of the City's zoning board and Council (42) 71 So. 2d 148.

8.

The majority opinion held that there was ample evidence to support the theory of the City (38) that the amount of property involved in the case was so great that to change its classification would necessarily affect the entire general zoning plan of the City (39).

9.

The special concurring opinion of the Chief Justice held that the appellants, in order to have invoked the administrative remedy provided by the City Charter, should have applied for a change in the use classification, the effect of which would have been to compel the Council to hold a public hearing on the question of whether the entire area should be reclassified. That if the request to rezone had been refused, then "it may be that in a judicial review of the decisions of the local zoning authority as authorized by Section 196.16 *et seq.* Florida Statutes, the Court would be authorized to decide the question of whether the zoning authority's refusal to rezone in the requested manner was an unreasonable exercise of the zoning power " (45) (Special opinion of Roberts, C. J.).

10.

The cause before the Circuit Court of Dade County and the Supreme Court of Florida was one of fact, namely, had there been such "physical changes in the surrounding area" and had the "phenomenal growth of the City of Miami Beach" been such as to cause the City zoning ordinance to be arbitrary and unreasonable as applied to the appellants' property?

11.

The appellants contend that the decision of the Supreme Court of Florida operated to deny them due process and equal protection.

12.

The appellants were not denied due process. Ample administrative remedies under the Charter of the City of Miami Beach are available to persons deemed to be aggrieved by the applicability of the zoning ordinance to particular property (R. 45). The appellants' case was tried in the Circuit Court of Dade County according to the procedure governing the trial of Chancery cases. A party is not deprived of his property without due process when he has had by the laws of the state a fair trial in a court of justice according to the applicable modes of proceeding.

*Davidson* v. *City of New Orleans*, 96 U. S. 97.
*Simon* v. *Craft*, 182 U. S. 427.
*Williams* v. *Parker*, 188 U. S. 491.

An erroneous decision in the state court does not constitute a denial of due process,

*American Railway Express* v. *Commonwealth*, 273 U. S. 269,

and the Constitutional guaranty does not demand that a litigant be afforded a second opportunity to litigate the existence of jurisdictional facts.

*Sherrer* v. *Sherrer*, 334 U. S. 343.

13.

The appellants were not denied equal protection. Appellants say that in the instant case they have proved that the classification complained of (single-family) effects, as to them, discrimination and oppression of inequality while granting undue favor and class privilege to other owners not so restricted. No such case as this is made out by the complaint. There is no charge in the complaint that the ordinance itself is discriminatory, but only that it operates oppressively against the plaintiffs by reason of a changed factual situation. The allegations of the complaint as stated in the order of the Circuit Court of Dade County presupposes the constitutionality of the ordinance in question; and indeed, the ordinance itself is not open to any such assault.

The appellants say in their brief (25) "that the owners of the 86 lots covered by the 40,000 square foot restriction, which includes the appellants, are the only persons and the only owners of property in the City of Miami Beach subject to this invidious discrimination." This statement is not entirely accurate with respect to the number of lots or the square foot restriction, but regardless of that, the fact that such a restriction was imposed upon the property in question would not amount to a denial of equal protection, and

no such attack upon the ordinance was made in the complaint.

The City of Miami Beach had an undoubted statutory and constitutional right to divide the City into zones and to prescribe the use classification to which property in each zone might be put. *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365.

The equal protection clause is simply a guaranty that all persons in the same class shall be affected in the same way. It prevents a discriminatory and unlawful classification. The complaint was not predicated upon an unlawful classification, and the cases relied upon by the appellants do not sustain the proposition contended for. The state has a broad discretion in the matter of classification, *Smith* v. *Cahoon*, 283 U. S. 533. If any state of facts can be conceived that would sustain the classification, there is a presumption of the existence of that state of facts, and the person assailing the classification has the burden of showing that the legislative action is arbitrary. *Borden's Farm Products Co.* v. *Baldwin*, 293 U. S. 194.

14.

The complaint did not raise the alleged Federal question asserted to exist, but only challenged the applicability of the ordinance by reason of an asserted change of conditions. Federal constitutional questions cannot be raised for the first time on appeal.

*United States* v. *New York Telephone Co.*, 326 U. S. 638.

*Shelley* v. *Craemer*, 334 U. S. 1.

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And especially is this the case when the Federal question was attempted to be raised by a petition for rehearing.

*Bowe* v. *Scott*, 233 U. S. 658.
*Miller* v. *Cornwall R. Co.*, 168 U. S. 131.
*Harding* v. *Illinois*, 196 U. S. 78.
*Consolidated Turnpike Co.* v. *Norfolk & Ocean View Ry. Co.*, 228 U. S. 326.

15.

The decision of the Supreme Court of Florida simply held that the question as to the applicability of the city zoning regulation to the appellants' property was one which was fairly debatable, and that being so, the judgment of the City Council was not subject to being overturned by the Courts. In so holding, the Court followed the decisions of this Court in *Holden* v. *Hardy*, 169 U. S. 366; *Radice* v. *New York*, 264 U. S. 292 and *Euclid* v. *Ambler Realty Co., supra.*

In the last cited case, the Court said that it was competent for the City, pursuant to a grant of power from the Legislature, to exclude apartment houses from an area set aside for private homes. This is the exact point which is involved in the case at bar. The City has determined that the property in question is best suited for single-family residences, and in so doing, has completely come within the rule of the Euclid case. In sustaining the zoning regulations in that case, this Court said that if the reasons which existed for the exclusion of multiple-family houses from single-family areas did not demonstrate the wisdom of the policy, at least, "the reasons are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."

16.

The decision of the Supreme Court of Florida was in line with its prior decision in *City of Miami Beach* v. *Hogan*, 63 So. 2d 495 (cert. denied *sub nominee H. Gertrude Hogan* v. *City of Miami Beach*, October Term, 1953, No. 132, 74 S. Ct. 33). This case involved a lot in the very area surrounding the *locii* in the cases at bar. The factual situations confronting the Court in the situation presented by the petition in that case and the appeal in this were practically identical. In the cited case, the Florida Supreme Court said:

> "If the Court adopts the policy of substituting their judgments for that of city officials, simply because of their refusal to rezone the property in accordance with the wishes of the landowner to increase the value of the land, they will eventually become the zoning boards for every county and municipality in the state."

For the reasons stated, this appeal should be dismissed or in the alternative, affirmed.

Respectfully submitted,

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.....,

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IN THE CIRCUIT COURT OF THE 11th JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY, FLORIDA, IN CHANCERY

No. 151847

RALPH LACHMAN and JEAN LACHMAN, Plaintiffs,

vs.

THE CITY OF MIAMI BEACH, a municipality created and existing under the laws of the State of Florida, Defendant.

**Bill of Complaint.**

COME NOW, the Plaintiffs, RALPH LACHMAN and JEAN LACHMAN, by their undersigned attorneys, and file this, their Bill of Complaint against the Defendant, THE CITY OF MIAMI BEACH, a municipality created and existing under the laws of the State of Florida, and allege:

I.

The Plaintiff, RALPH LACHMAN, is a resident of Dade County, Florida, and is over the age of twenty-one years; the Plaintiff, JEAN LACHMAN, is a resident of Dade County, Florida, and is over the age of twenty-one years.

The Defendant, THE CITY OF MIAMI BEACH, is a municipal corporation, organized and existing under the laws of the State of Florida.

II.

The Plaintiffs, as tenants by the entirety, are the owners in fee simple of the following-described property, situate, lying and being in Dade County, Florida, to-wit:

> Lots 13 and 14 of INDIAN BEACH CORPORATION'S AMENDED PLAT, according to the Plat thereof, recorded in Plat Book 8, at page 61, of the Public Records of Dade County, Florida; and
>
> Lot 19, FIRST OCEANFRONT SUBDIVISION, according to the Plat thereof, recorded in Plat Book 9, page 78, of the Public Records of Dade County, Florida.

Since December 3rd, 1930, under the provisions of Zoning Ordinance No. 289, the aforedescribed property has been restricted in its use to single family dwelling purposes or estate purposes, being zoned RAA.

III.

That prior to the institution of this suit, and on the 8th day of May, 1952, the Plaintiffs, as owners of the above described property, filed a formal application for rezoning of said lots or parcels of land with the City Zoning Board of the City of Miami Beach, from RAA (Single family) to RE, to allow for multiple family, apartment and hotel use of said property; that said application for change in zoning was denied by said City Zoning Board on the 10th day of July, 1952; that Plaintiffs then filed a formal appeal from the decision of said Zoning Board before the City Council of the City of Miami Beach, but the City Council of the City of Miami Beach on the 16th day of July, 1952, affirmed and upheld the decision of the

Zoning Board, denying Plaintiffs' application for change in zoning. Therefore, Plaintiffs exhausted all administrative remedies available to them before filing this action.

IV.

Plaintiffs show that the land in question is situated in the area immediately north of 44th Street at Miami Beach, Florida, bounded on the west by Collins Avenue and on the east by the Atlantic Ocean. The south boundary of the land involved is in close proximity and similar in nature to the 7-acre tract of land known as Lot A, otherwise properly described as the Firestone Estate. Plaintiffs would show unto the Court that the said Lot A, consisting of some 700 feet north to south and lying between the Atlantic Ocean on the East and Collins Avenue and Indian Creek to the west, is part of a narrow strip of land contiguous with the property of your Plaintiffs and is not separated in any way by any natural boundary, street, parkway or any type of waterway, greenswards or parks; that the land is of identical nature in its east to west boundaries and is of the same type of soil, the same height and is suitable for and in demand only for the same uses and purposes of Lot A; that under the Zoning Ordinance of December 3rd, 1930, Ordinance No. 289, both Lot A and the property of your Plaintiffs were zoned under the RAA classification, which limited or restricted its use for single family estate purposes.

V.

Plaintiffs would further show unto the Court that since 1930 great changes have taken place in the City of

Miami Beach, and particularly within the area in question; that this land is no longer suitable for or in demand for single family purposes; that not only has the demand for this property ceased for single family uses, but that the immediate area surrounding the property, which comes under the same category, has now been changed so as to permit the construction of hotels and apartments on the said Lot A. Plaintiffs would further show that due to tremendous increases in population of the City of Miami Beach and the tremendous development of the hotel and apartment house area, both to the north and south of the property in question, and due to the pressure of the demand for multiple family uses right up to Lot A, the said Lot A, was re-zoned by the Council of the City of Miami Beach, pursuant to the mandate of the Supreme Court of Florida, as shown by a reported decision in said cause affecting said Lot A reported in 45 So. 2d 681, in which it is said:

> "The lands in question lie between the Atlantic Ocean and what is known locally as Collins Avenue, the main thoroughfare through the city, they are 8.13 acres in area and, as heretofore pointed out, are bounded on the South by an area zoned for hotels and apartment houses which have in fact been constructed up to and adjoining the Firestone lands. The ordinance in question was adopted in December, 1930, the population of the City is now six times what it was then; and many other changes have taken place. Before the institution of this suit, the city made a finding that the general welfare did not require the lands to be used exclusively for single family residences, but on the other hand, they should be acquired

by the city and developed for ocean park purposes. Both the Master and the Chancellor found that the zoning restrictions had reduced the value of the lands of complainants by three-fourths, that as zoned for the uses indicated by the ordinance, they were worth $400,000 but if permitted to be used for apartment houses and hotels, as were the lands adjoining them, they had a value of $1,750.00. The evidence shows conclusively that the lands are more valuable for hotel and apartment houses than any other purpose.

"Zoning restrictions, like other phases of the law, are subject to change or removal when the reason for them ceases. When they run afoul of the public welfare appears to be a good test to direct their removal. The public welfare is a concept that broadens with changing times and circumstances and it now embraces many species of regulations that the courts of yesterday would not have brought within its range. There must be a positive showing of physical, economic or social change rather than esthetic or group caprice to justify the release of zoning regulations. They will not be released at the behest of community or group pressure, if in doing so, constitutional guaranties are undermined. The ordinance in question had been in effect fourteen years, during which time numerous physical, economic and social changes in the locus had taken place. Not a single property owner in the City is shown to be hurt by removing the zoning restrictions as to the lands of the appellee, yet if they are not removed they will cost appellee more than one million dollars. There is no showing that the zoning plan of the City will be jeopardized or materially affected by removal. Under such circumstances they amount to confiscation."

VI.

Plaintiffs further show at the time of the adoption of the said zoning ordinance aforesaid, the City of Miami Beach consisted of approximately 7,000 residents and that the pattern of its future growth could not be fixed and ascertained. The population is now in excess of 60,000 inhabitants and the pattern of its progress and growth has been such with the change in zoning by the City of Miami Beach on Lot A (the Firestone Estate) that the property described herein is presently unsuitable and not in demand for estate purposes, but is in great demand as a location for the site of apartment houses and/or hotels.

VII.

(a) Your Plaintiffs would further show unto the Court that since the re-zoning of said Firestone Estate, the City of Miami Beach has caused condemnation proceedings to be instituted in a certain suit, syled *City of Miami Beach* v. *Hogan, etc.*, Common Law No. 26707, in the Circuit Court of Dade County, Florida, for the purpose of condemning the following described property, to-wit:

> Lots 6, 7, 8 and 9 of INDIAN BEACH CORPORATION AMENDED, according to the Plat thereof, recorded in Plat Book 8, page 61, of the Public Records of Dade County, Florida,

for public use as beaches and parks.

(b) Your Plaintiffs would further show unto the Court that since the re-zoning of said Firestone Estate, the City of Miami Beach has caused condemnation proceed-

ings to be instituted in a certain suit, styled *City of Miami Beach* v. *Bell, etc.*, Common Law No. 27083, in the Circuit Court of Dade County, Florida, for the purpose of condemning the following described property, to-wit:

> Lots 8, 10, 11, 12, of SECOND OCEAN FRONT SUB., according to the Plat thereof, recorded in Plat Book 28, page 28, of the Public Records of Dade County, Florida,

for public use as beaches and parks.

(c) Your plaintiffs would further show that the property described in sub-paragraph (a) hereof is located between the said Firestone Estate and the property involved in this cause and that the property described in sub-paragraph (b) hereof is located north of and in close proximity to said property in question.

Your Plaintiffs verily believe, and, therefore, allege, that the existence of public beaches and parks in close proximity to the north and to the south of the property involved in this suit and hereinbefore more particularly described in Paragraph II hereof completely destroys its value as private estates and greatly enhances the value of such property for multiple dwelling purposes.

VIII.

Plaintiffs would further show unto the Court that the land, in its present restricted zoning classification, is worth less than $1,000 per front foot and that there is no market for said land or demand for such purposes, even at that price; that if the property is re-zoned so as to permit use for multiple family purposes the land will

have a value of $4,000 per front foot and that the land will be readily usable and saleable for such purposes at such price. Plaintiffs further show unto the Court that *bona fide* negotiations are presently pending for the sale of the Firestone Estate, Lot A, at $2,300.00, or approximately $4,000 per front foot, brought about solely by the change in the zoning from RAA estate classification.

IX.

Plaintiffs would further show unto the Court that the land in question, identical in nature to the Firestone Estate, which is zoned for hotels and apartment house construction, has even less utility value for RAA estate districts than existed before the Supreme Court of Florida ordered the change of said zoning, by reason of the proposed plans for public beaches and parks in the immediate area through condemnation proceedings hereinbefore referred to in Paragraph VII hereof, as well as other properties in the same strip of land, contiguous to said Firestone Estate and the property herein involved, which proceedings the citizens of Miami Beach voted over-whelmingly in favor of an election to approve the issuance of general obligation bonds for that purpose. And Plaintiffs further show that the Firestone Estate has brought about not only the demand for the change, but the actual demand and necessity for a change of the zoning on Plaintiffs' property to correspond with that of its contiguous property, to-wit: the Firestone Estate.

X.

Plaintiffs further show unto the Court that the provision of Ordinance No. 289 of the City of Miami Beach

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requiring that the Plaintiffs' property be used only for single family purposes is not now predicated on and now has no relation to public safety, public health, public welfare or public morals and the maintenance of the same in its present zoning is not of any aid or benefit to any general plan of the development of the City of Miami Beach.

XI.

Plaintiffs further charge that not a single property owner of the City of Miami Beach will be hurt by removing the zoning restrictions as to the lands of the Plaintiffs and yet, if the zoning restrictions are not removed, the Plaintiffs will suffer a damage in excess of $1,500,000 and that under such circumstances, the continuance of such a zoning regulation amounts to confiscation.

XII.

Plaintiffs further show unto the Court that the maintenance of the present zoning, as applied to the particular property in question, is therefore, arbitrary, unreasonable, and unconstitutional, and should be decreed by this Court of equity to be null, void and unenforceable as against the Plaintiffs' property.

WHEREFORE, your Plaintiffs, being without remedy in the premises, save and except in a Court of Equity, pray:

(a) That this Court grant the Plaintiffs a speedy hearing in the cause;

(b) That this Court, by its decree, rezone the property of the Plaintiffs from RAA Estate District (single family) to RE Multiple Dwelling.

(c) That this Court, by its decree, establish and declare that that portion of Zoning Ordinance No. 289 of the City of Miami Beach, passed on December 3rd, 1930, restricting the use of Plaintiffs' property to RAA Estate District (single family) is unreasonable, arbitrary, confiscatory and unconstitutional.

(d) That this Court permanently enjoin and restrain the municipality of the City of Miami Beach from enforcing the said zoning ordinance against the Plaintiffs' property described in the Complaint.

(e) That this Court grant such other and further relief as to it may be deemed equitable and proper.

Pallot, Silver & Mulloy
Attorneys for Plaintiffs
804 Ingraham Building
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By /s/ William L. Pallot
William L. Pallot, of Counsel.

STATE OF FLORIDA )
)SS.
COUNTY OF DADE )

Before me, the undersigned authority, personally appeared WILLIAM L. PALLOT, who having been by me first duly sworn, on oath deposes and says: That he is a member of the firm of Pallot, Silver & Mulloy, attorneys for the Plaintiffs herein; that he has read the foregoing Bill of Complaint and knows the contents thereof and that the matters and things alleged therein are, to the best of his knowledge, true and correct.

/s/ William L. Pallot

Sworn to and subscribed before me this 29th day of July, A. D. 1952.

/s/ Sam I. Silver
Notary Public, State of
Florida at Large.

My Commission expires: